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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1826~~ 1416

JOAN FLORES DELANEY,
Petitioner,

vs.

UNITED SERVICES LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Joan Flores Delaney, a widow, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on March 31, 1966.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, San Antonio Division (R. p. 42), is reported in Vol. 201, F. Supp., p. 25. A copy is appended as Appendix I.

The first opinion of the Court of Appeals sitting in division is reported in 308 F.2d, p. 304. A copy is appended as Appendix II. (R. p. 73).

The second opinion of the Court of Appeals rendered *En Banc*, reversing the two opinions identified above has not been reported and is appended hereto as Appendix III. (R. p. 181).

The opinion of the Fifth Circuit in a companion case, *Paul Revere Life Insurance Company* v. *First National Bank in Dallas, Administrator of the Estate of Loy Thomas Brown, Deceased*, No. 19604, is appended hereto as Appendix IV.

JURISDICTION

The judgment of the Court of Appeals rendered *En Banc* was entered on March 31, A.D. 1966.

Jurisdiction to issue the Writ rests on Title 28, United States Code Ann., Sec. 1254 (1).

On the 8th day of April, A.D. 1966, the Fifth Circuit Court of Appeals entered an order staying the mandate for a period of 60 days to enable petitioner to apply for a Writ of Certiorari from the Supreme Court of the United States; said original order was filed on April 11, 1966.

QUESTIONS PRESENTED

1. When the Supreme Court of a state has ruled on a particular question concerning life insurance law, are not federal courts sitting in that state required to follow said Supreme Court decision?

2. Is Title 28, U.S.C., Sec. 1652 (State laws as rules of decision) reading as follows,

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c 646, 62 Stat. 944."

still binding on a federal court sitting in a state?

3. Is the long standing rule of construction by this Court and the Supreme Court of Texas that an ambiguous policy of life insurance will be strictly construed against the company whose language it is and liberally in favor of the beneficiary to be nullified by the Fifth Circuit Court of Appeals?

4. When a Circuit Court of Appeals has affirmed a District Court decision and has denied a rehearing and the statutory time for appeal has lapsed, is this not a final judgment?

5. Can a Circuit Court of Appeals decide Case No. One, deny a rehearing thereon, then three and one half years later decide Case No. Two, and use its own precedent in Case Two, as a basis for reversing Case One, without violating the due process clause of the Fifth Amendment of the United States Constitution?

STATEMENT OF THE CASE

On the first day of October, A.D. 1957, the Respondent life insurance company, issued its policy No. 52150 on the life of Robert H. Delaney. On May 8, 1959, Robert H. Delaney was killed while piloting an aircraft owned by the United States Army. Petitioner made demand upon the company for the face amount of said policy as provided by Article 3.62 of the Insurance Code of Texas. The Respondent Company denied liability and refused to pay the proceeds basing same on their rider 262, "limitation due to aviation hazard" attached thereto.

On the 15th day of September, A.D. 1959, your petitioner filed suit against the Respondent Company in the United States District Court, Western District of Texas, San Antonio Division. Jurisdiction was based on Title 28, United States Code Ann., Sec. 1332, Diversity of Citizenship.

After Respondent had answered and the parties had exchanged requests for admission of fact, the case was tried before the Court on an agreed stipulation as to the facts. (R. pp. 11, 16, 18, 40). Petitioner obtained judgment against Respondent for the full face amount of the policy plus interest, attorney's fees, and penalties provided by law. The opinion of the trial court is reported in Vol. 201, F. Supp., p. 25, and a copy is appended hereto as Appendix I.

The Respondent duly excepted to the ruling of the Court, filed a proper bond and appealed to the United States Court of Appeals for the Fifth Circuit sitting at New Orleans. The case was orally argued before a division of the Court on the 4th day of June, 1962, before Judges Cameron, Gewin, and Wisdom. On the 26th day of September, 1962, the above division of the Fifth Circuit af-

firmed the decision of the trial court by a vote of two to one; Judge Wisdom dissenting. Respondent filed a motion for rehearing which was denied on the 26th day of October, 1962. The opinion may be found in 308 F.2d, p. 302 (R. p. 73); a copy is attached hereto as Appendix II.

The Respondent Company requested and was granted numerous stays of mandate based on the allegation that it was petitioning this Honorable Court for a Writ of Certiorari. After the time for appeal to this Court had elapsed, the Judge who wrote the minority opinion for the Fifth Circuit continued to grant stays of mandate. This was done notwithstanding the fact that the time for appeal had expired and the further fact that Respondent had no motion for a second rehearing before the Court. In fact, Respondent had no motion before the Court at all.

After the time for appeal to the United States Supreme Court had expired by operation of law, the Fifth Circuit Court of Appeals on the 16th day of October, 1963, granted a rehearing in this case. The second motion for rehearing was not filed until March 1, 1963, which was after the time for Certiorari had expired by law. Subsequently, on the 31st day of March, 1966, the Fifth Circuit sitting *En Banc,* reversed the opinion of its division and of the trial court and decreed that the Petitioner, Mrs. Delaney, take nothing. This application is the result of the above action by the Fifth Circuit.

It is petitioner's contention that the trial court and the division of the Circuit Court of Appeals correctly followed the law of Texas as laid down by the Supreme Court of Texas on a question of State law. The Circuit Court of Appeals sitting *En Banc,* chose to substitute its own opinion for the said opinion of the Supreme Court of

Texas. Unless we have reached a point in the evolutionary process of our federal jurisprudence where federal courts are not required to follow Supreme Courts of states on matters of state law; then this case should be reversed.

REASONS FOR ALLOWANCE OF WRIT AND ARGUMENT

Argument and Authority on Questions One, Two and Three

The Texas Supreme Court decision, which petitioner respectfully alleges controls this law suit, is *Continental Casualty Company* v. *Warren*, Texas Supreme Court, decided January 28, 1953, reported in 254 S.W.2d, p. 762; the Warren case was decided by the Supreme Court of Texas more than four years prior to the issuance of Lieutenant Delaney's policy of life insurance by the Respondent. There are actually two written opinions on the Warren case; the first being the Court of Civil Appeal's opinion which will be found in 248 S.W.2d, p. 315.

The policy of life insurance which is to be construed in this law suit revolves around the legal construction to be given the company form 263, "limitation due to aviation hazard" which reads as follows:

> "If this policy shall become a claim by death of the husband due to any service, training, travel, flight, ascent, or descent in, on, or from any species of aircraft at anytime EXCEPT DEATH RESULTING FROM TRAVEL AS A PASSENGER ON AN AIRCRAFT OWNED AND OPERATED BY THE UNITED STATES GOVERNMENT (Emphasis ours) or as a passenger on a licensed aircraft operated by a licensed passenger pilot on a scheduled passenger air service regularly offered by the specified airports, the liability of the company under this policy shall be limited to the premiums paid hereunder, or to the then net reserve at time of death if greater; any provision in this policy to the contrary notwithstanding."

The above rider has to the best of the litigant's knowledge, never been construed by any court of record in the United States until the Delaney case arose. If the insured was a passenger on a plane owned and operated by the United States Government then he was unquestionably covered by the policy or rider in question. This rider is certainly capable of more than one construction. This was the holding of Judge Spears, the United States District Judge whose opinion is appended hereto (Appendix I) and was also the opinion of the division of the Fifth Circuit Court of Appeals previously identified hereinabove. (Appendix II). The faulty use of language therein becomes apparent when illustrated as follows:

> "Death of the insured due to any:
>
> SERVICE—Except death resulting from travel as a passenger.
>
> TRAINING—Except death resulting from travel as a passenger.
>
> TRAVEL—Except death resulting from travel as a passenger.
>
> FLIGHT—Except death resulting from travel as a passenger."

A passenger on a plane owned and operated by the United States Government is unquestionably covered by this policy of insurance. In any of the above situations we would still have the question of whether or not the deceased was a passenger on said aircraft. The legal question then arises, is the pilot of a plane a passenger? The Courts of Texas have answered this question in the affirmative and have held that a pilot of a plane is a passenger. The case in point is the Warren case identified hereinabove. I will quote first from the Civil Appeal's opinion of the *Warren* case, 248 S.W.2d beginning at page 316 where we find the following:

"Appellee answered fully and alleged a special exception to appellant's petition asserting that since said petition alleged that JESSIE C. WARREN, an employee of Callery & Hurt, Inc., was PILOTING (Emphasis ours) the aircraft when the fatal injury occurred he was not in fact riding as a passenger and therefore was not covered."

"The question raised by appellee's special exception is founded upon the construction to be given the word passenger as used in the injury clause of the policy."

"Since the insurance policy before us for consideration did not specifically exclude the pilot from coverage we must therefore, resort to fundamental rules of interpreting life insurance policies which have been handed down by our courts as terms of the policy must be interpreted in the light of common sense; that the language of an insurance policy which is susceptible of more than one construction should be interpreted strictly against the insurer and liberally in favor of the insured."

"There are other words and phrases in the policy which we must consider along with the meaning of the word passenger. However, we note here that the word passenger is used in general terms and it is not to be given the same construction as it usually carries involving the transportation of *persons for hire.* As we view it, the word passenger is used here in the ordinary sense with the word occupant. An automobile is usually described in terms of the number of passengers it was built to transport including the driver that is, a five-passenger car, etc. The policy describes the plane in question as being a twin engine six-passenger place Beachcraft, which statement no doubt would be construed by a layman to include a place for the pilot."

"The least that can be said is that it is susceptible to two interpretations. We find the word passenger has

no universal or inflexible meaning which will apply to all cases. There is stated in 13 C.J.S., Carriers, page 1047:

> 'It is difficult to lay down a comprehensive definition of the word passenger or to exhaust in a single statement all the possible circumstances under which the relation of carrier and passenger may exist.' "

"Webster's Twentieth Century Dictionary defines passenger as 'one who passes on his way; a traveler; a pilgrim; a wayfarer'."

"If the parties intend for the contract to eliminate coverage of the pilot it could have so provided by using some reasonable term such as 'exclusive of pilot', or 'this policy does not cover the pilot, mechanics, or any person riding in the plane employed by the insurer to manipulate, to work on, to supervise, or to assist in the operation of the plane'."

The Supreme Court of Texas granted a Writ of Error in the Warren case and after hearing same in all things affirmed the judgment of the Court of Civil Appeals. The Supreme Court case is styled *Continental Casualty Co.* v. *Warren,* 254 S.W.2d, p. 762, rehearing denied January 28, 1953. Your petitioner will quote from page 762 of said Supreme Court opinion which explains the law of Texas on this point:

> "The only question presented for us is whether the claim is without the policy coverage because pilot Warren was killed while piloting the plane as distinguished from being merely transported therein." (THE EXACT QUESTION IN THE DELANEY CASE).

> "Further on in the policy there is a special part or chapter entitled 'Exclusions', which in brief disclaims coverage for any loss resulting from suicide, war, mili-

tary or naval service accident occurring while the aircraft herein described is carrying passengers for hire and certain types of flying such as acrobatic stunting, racing, and endurance testing. Neither in this, nor in any part of the policy is there language which could fairly be described as categorically excluding the pilot or any class of insured person within which the pilot would necessarily fall. Nor most certainly is there any provision directly and expressly limiting coverage under the policy generally to such an officer, employee, or guest as should at the time be a passenger of the plane."

"But for the fact that insurance policies are governed by the special rule of construction which is a familiar part of our jurisprudence, we might, indeed hold either that interpretation against liability of the insurer should prevail, or that the policy being ambiguous there is a fact issue as to what was intended. Yet, the rule of course applies and under it the insurer may not escape liability merely because his or its interpretation should appear to us a more likely reflection of the intent of the parties than the interpretation urged by the insured. The latter being no more than one which is not itself unreasonable. Lloyd's Casualty Insurer v. McCrary, 229 S.W.2d, p. 605. A related or subsidiary rule is 'that exceptions and words of limitation will be strictly construed against the insurer'. Providence Washington Insurance Co. v. Profitt, 239 S.W.2d 379. For all of the particular considerations reasonably indicating that the pilot is not covered there are yet others making it not unreasonable to say that he is and the insurer is therefore liable * * * Obviously the question could have been easily disposed of beyond a doubt by a few words in the 'Exclusion' section or by inserting a phrase such as, 'other than the airplane operatives' in the insured person paragraph, or inserting after bodily injury in the risk paragraph 'to a person other than the one piloting the plane'. But there is no such clear exclusion of the pilot anywhere in the policy and the injury thus has to bottom its position on the risk or

injury proviso 'that such injury is sustained by the insured person in consequence of riding as a passenger, in boarding, alighting from or being struck by the plane'. Certainly without the italicized words we would have not had this law suit, whatever else may be said to aid the construction alleged by the insurer. The pilot would be covered because (a) he is an insured person under the initial paragraph and (b) the insured risk came to pass."

"Now the mere word passenger cannot be said to exclude the pilot although hereto the insurer might HAVE EXCLUDED HIM BEYOND QUESTION BY THE SIMPLE INSERTION OF A PHRASE SUCH AS 'AND NOT THE PILOT'. (Emphasis ours). As sufficiently demonstrated in the opinion of the Court below, such dictionary definitions as give the word a significance of non-operator of the vehicle concerned are but one of several definitions given while common parlance undoubtedly uses it at times in the sense of occupant of a private vehicle as in the familiar expression 'a six-passenger automobile'. We are cited to no decision fixing the meaning to exclude the operator of a private vehicle which the airplane in question here undoubtedly was and the significance of passenger as applied to common carriers for hire has no relevance to a situation where no carriage for hire, public or private is concerned * * *. Nor do those statutes regulating aviation which choose to define 'passenger' and 'pilot' in mutually exclusive terms even purport to regulate the meaning of insurance policies or have more than a very remote bearing on general usage as distinguished from specialist or military understanding of those words. General usage is of course the proper criterion as evidenced by the very decisions cited for the insurer in the instant case."

"It must be conceded that the full phrase 'riding as a passenger in' does suggest a meaning of passenger as being a non-operative phrase AND SINCE 'AS A PAS-

SENGER' CAN BE CONSTRUED TO MEAN 'AS AN OCCUPANT' AND TAKEN AS INADVERTENT TAUTOLOGY, THE RULE OF CONSTRUCTION IN INSURANCE CASES FAVORS THE SOLUTION RATHER THAN ONE EXCLUDING THE PILOT. (Emphasis ours)."

"Another effort to show that the pilot is with total clarity excluded from coverage, consists of a sort of paraphrase of the injury definition or risk paragraph so as to offset the noun 'passenger' in the riding risk paragraph against the participle 'piloted' occurring some 50 odd words later on in a final clause of the same sentence. Certainly the result is consistent with the idea that 'passenger' includes the meaning of non-pilot though clearly also it adds to the confusion as to just who is covered by the policy because of the further inference if there be any inference, is that the policy covers all insured persons except the pilot which the insurer evidently contends not to be the case. In any event the argument has little positive force. The noun 'pilot' nowhere occurs and the participle 'piloted' could just as well have been driven or flown. Obviously, all automotive vehicles have to be driven or piloted, and the purpose of the clause in which piloted occurs was not to describe further who was or was not an insured person but to reduce liability for accidents due to unskillful handling of the plane."

"This is quite clear from the language which lies between 'riding as a passenger in' and the word 'piloted' and which purports to mean that no coverage at all exists under the policy unless the plane is flying when the accident occurs. The clause amounts to no more than a separate proviso that flying accidents are excluded when the person operating the plane is not properly licensed. The inference that the pilot is excluded from coverage is only an inference and a rather remote one."

> "Since, therefore, the intent of the policy to exclude the pilot is not so certain as to make it wholly unreasonable as to say that he was included the judgment of the Court of Civil Appeals so holding should be affirmed and it is so ordered."

The Respondent insurance company could very easily have excluded the pilot from coverage under the law of Texas as the Texas Supreme Court has pointed out in the above-quoted case; it should be remembered that the Respondent company had a period of four years between the date of the Warren decision and the issuance of Lieutenant Delaney's policy in which to change its policy wording. They did not exclude the pilot under Texas law and consequently his widow, the Petitioner herein, is entitled to recover as was decreed in the United States District Court for the Western District of Texas and the Fifth Circuit Court of Appeals sitting in division.

Reference is here made to the dissenting opinion of Judge Gewin in cause No. 19604 styled *Paul Revere Life Insurance Company* v. *First National Bank in Dallas, Administrator of the Estate of Loy Thomas Brown, Deceased;* said opinion being attached hereto as Appendix IV. In his dissenting opinion Judge Gewin stated:

> "The majority should not overrule and reverse the decision of two United States District Judges from Texas both of whom have had long and varied experience in deciding Texas law without citing one Texas case to support its conclusion on the chief issue here presented. Judge Spears of the Western District is overruled in United Services Life Insurance Company v. Delaney; and Judge Davidson of the Northern District in Paul Revere Life Insurance Co. v. First National Bank in Dallas by opinions rendered simultaneously on this date."

"The lame and specious distinction by which the majority opinion undertakes to sweep aside the decisions of these two judges and the controlling case from the Texas Supreme Court, Continental Casualty Company v. Warren, 254 S.W.2d 315 is unwarranted, illogical, and insupportable in Texas law."

"It is unable to remember that the decisions of the two United States District judges of Texas were rendered independently of each other, at different times and in separate district Courts, with respect to different insurance policies. Even so, both reached the same conclusion for substantially the same reason—ambiguity in the meaning of the word 'passenger'. Both decisions were rendered prior to our decision in Delaney, 308 F.2d 484 (1962). If these two United States district judges are correct, as they surely must be, then the majority is also overruling the decision of the Court of Civil Appeals of Texas composed of three Texas Judges, and five Justices of the Supreme Court of Texas, making a total of ten Texas judges who have held the meaning of the word 'passenger' to be ambiguous."

"I take my stand with the Texas judges on what constitutes Texas law. That is our duty under the Erie Doctrine whether or not we like the Texas law."

Concluding her argument under questions one, two and three of this petition, Mrs. Delaney respectfully states to this Honorable Court that the Fifth Circuit Court of Appeals has failed to follow the law of Texas in this case and that these three questions should be answered by this Honorable Court in her favor. *Erie Railroad Company v. Tompkins,* 304 U.S. 64-92.

Argument and Authorities under Question Four

It is petitioner's contention that an examination of this record including the numerous stays of mandate granted by the Fifth Circuit will reveal that at one point in these

proceedings your petitioner held a valid final judgment against the Respondent company. It will be remembered that the Respondent company following the affirmation of the District Court by a division of the Fifth Circuit, made numerous applications for stay of mandate based on the proposition that Respondent was going to petition this Honorable Court for a Writ of Certiorari. The applicable law to such a proceeding is to be found in Title 28, U.S.C.A., Sec. 2101 (C), which reads as follows:

> "Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a Writ of Certiorari for a period not exceeding sixty (60) days."

Petitioner respectfully states that the Fifth Circuit Court of Appeals denied Respondent's motion for rehearing by order dated October 26, 1962. (R. p. 105). A check of the record will reveal that at the time the above-identified 90 days had expired (January 26, 1963) there was *no motion for rehearing pending* before the Fifth Circuit Court of Appeals since it was not filed until March 1, 1963. (R. p. 112). In view of the statutory requirement quoted above and the further fact that *no extension of time had been applied for or granted by a Justice of the Supreme Court of the United States*, it is elementary that by operation of law the judgment of the division of the Fifth Circuit Court of Appeals become final 90 days from the date of its rendition on the 26th day of October A.D. 1962, which would be January 26, 1963. Your petitioner further prays the Court to sustain her in this contention, that said judgment was final by operation of law as hereinabove stated. In connection with this specific point your petitioner respect-

fully cites the holding of this Honorable Court in the case of *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412-415, 87 L. Ed. 1483, and we quote from the opinion:

> "The purpose of the statutes limiting the period of appeal is to set a definite point of time when litigation shall be at an end unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose. Would-be appellants could prolong indefinitely the appeal period by making application to one Judge within the three months and upon its denial by applying successively to other Judges even after the prescribed time for appeal has ended. Moreover in such cases, extension of the period for appeal could be limited only by recourse to the Doctrine of Laches applied in the particular circumstances of each case."

> "We conclude that if appellant's application for allowance of the appeals after the expiration of the three months period were too late, and that this Court is without jurisdiction to entertain the appeals which are accordingly dismissed."

An examination of the record herein will reveal that the Fifth Circuit Court of Appeals retained jurisdiction long after the time limit for Certiorari had expired and the division judgment was final. Petitioner's opposition to Respondent's late motion for second rehearing will be found in the record at page 121 *et seq.*

Argument under Question Five

The record will reflect that on September 26, 1962, the Fifth Circuit Court of Appeals rendered its decision affirming the judgment of the United States District Court for the Western District of Texas. (R. p. 73). The record will also reflect that on October 26, 1962, a rehearing was

denied. (R. p. 105). Subsequently when no petition for Certiorari had been filed with this Court within the time prescribed by law the Fifth Circuit Court granted a rehearing and decided to consider this case jointly with another which was junior on its docket; we refer to Cause No. 19604 known as the Paul Revere case. On the 31st day of March A.D., 1966, which was a period nearly four years from the denial of the rehearing in the Delaney case the Fifth Circuit rendered its decision in the Paul Revere case and then used the Paul Revere case as a *precedent* for the reversal of our Delaney case.

Your petitioner respectfully alleges and asserts that this type of judicial conduct which the Fifth Circuit Court of Appeals performed violates the due process clause of the Fifth Amendment of the United States Constitution and, in fact, is such a flagrant violation of judicial conduct as to warrant a reversal of the Court's action.

The Court by its conduct has in effect used a precedent which was not in existence at the time of the decision of the Delaney case and has, in fact, given it retroactive effect which is clearly a violation of due process. In this connection your petitioner, Mrs. Delaney, alleges and asserts that the decision of the Paul Revere case has not been published; that she had no opportunity to study or distinguish it; that she could not and was not afforded an opportunity to brief the questions concerned in the Paul Revere case; and that said arbitrary action by the Fifth Circuit Court of Appeals has grossly violated her rights to a full and impartial hearing on all matters pertaining to her case; she further alleges that said conduct by the Fifth Circuit might well constitute a decision by a secret precedent unknown and unpublished, and that she had no opportunity to argue or brief, or distinguish this case before the Fifth Circuit Court of Appeals.

CONCLUSION

In the dissenting opinion of Judge Gewin in the Paul Revere case, which also refers to the Delaney case found in Appendix IV of this petition we find the following which quite succinctly states Mrs. Delaney's position, which Petitioner believes should be considered by this Honorable Court:

> "It is with regret that one must come to the realization that the beneficiaries, of these insurance policies, purchased by deceased's loved ones for the benefit of such beneficiaries, will be denied the protection purchased for them by those who paid their money for the policies. I would not take their money away from them because the law of Texas says they should have it. In its revolt against the law of Texas, the majority has unwittingly fallen into egregious error, and a grave injustice has resulted. Perhaps the only remedy in the federal judicial system left to the beneficiaries is to seek the elusive and expensive Writ of Certiorari. Perhaps they will do so."

In consonance with the above-dissenting opinion by Judge Gewin your Petitioner, Joan Flores Delaney, a widow, prays the Court to grant this her petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and that after hearing, herein, that the judgment of the Fifth Circuit Court of Appeals sitting *En Banc* be reversed and the judgment of the Fifth Circuit sitting in division as well as the judgment of the District Court of Texas be in all things affirmed.

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOAN FLORES DELANEY
VS
UNITED SERVICES LIFE INSURANCE COMPANY

Civil Action No. 2782

Opinion

This suit involves the construction of a "Limitation Due to Aviation Hazard" provision of a $20,000.00 life insurance policy issued by the defendant, a District of Columbia corporation, to Robert H. Delaney, as the insured, on October 1, 1957. The plaintiff, widow of the insured, a resident of Bexar County, Texas, was named as the primary beneficiary. The case was submitted to the Court, without a jury, upon the pleadings, admissions and stipulations of the parties.

In his application dated September 28, 1957, the insured, at that time a Lieutenant in the United States Army, stated, among other things, that he had applied for army aviation; that he had been accepted in the Judge Advocate's branch; that he did not then desire aviation; and that he would decline aviation if he was accepted. By an amendment to the application, dated the same day, the following provision was added:

> "LIMITATION DUE TO AVIATION HAZARD
> "If this policy shall become a claim by death of the insured due to any service, training, travel, flight, ascent or descent in, on, or from any species of air-

craft at anytime, except death resulting from travel as a passenger on an aircraft owned and operated by the United States Government or as a passenger on a scheduled passenger air service regularly offered between specified airports, the liability of the company under this policy shall be limited to the premiums paid hereunder or to the then net reserve at time of death, if greater; any provision in this policy to the contrary notwithstanding."

The insured certified that he had done no flying except as a passenger under the conditions outlined in said amendment.

When the policy was issued, it contained a rider incorporating the provision above quoted, and the words "Limitation Due to Aviation Hazard included," were typed on its front and back. It was in full force and effect when the insured died on May 8, 1959, of injuries received as the pilot and only occupant of an aircraft owned and operated by the United States government, which crashed near Spring Branch, Texas, while on a night training flight. At the time of his death, the insured was receiving incentive pay and was on duty as a regular officer.

Prior to the accident which claimed his life, the insured, on May 1, 1958, advised the defendant on a "Change of Mailing Address" card, with respect to his new mailing address, and, in addition thereto, stated:

"Due to change in my orders I am now going to Flight School at San Marcos, Texas, so please advise me as to your policy."

By letter to the insured dated May 13, 1958, an agent of the insured wrote that an amendment form "for the purpose of adding extra aviation coverage" to the policy was being enclosed, and advised that if the insured wished

to "add aviation coverage," he should complete the form as therein instructed, and return it to the company, together with his policy. The cost of this coverage was stated to be $ .50 per month per $1000 of insurance, or $5.00 per month at the allotment rate. The insured was further advised to correct his allotment, but that since it would probably take two months for the corrected allotment to go through, he should send a check for $10.00 to pay the extra aviation premium for the months of June and July. The amendment form requested the insurer to "cancel Limitation Due to Aviation Hazard and increase premium to $23.30 effective 1 June 1958."

Apparently, the insured completed the form and returned it to the company together with the $10.00 check, because on May 28, 1958, the same agent for the insurer again wrote to the insured expressing regret that an error had been made in computing the extra premium. He enclosed the old form to be destroyed by the insured as well as new forms indicating that the increase in the monthly allotment would be $28.30, instead of $23.30, making the additional premium $10.00 per month, instead of the $5.00 amount previously quoted. Whereupon, by a postal card dated June 28, 1958, and mailed the same day at San Marcos, Texas, the insured told the agent to cancel the aviation clause in his policy, saying, "I think an additional $10.00 per month for aviation coverage is outrageous. I have other policies that did not even increase when I entered Flight School. If I could get my premiums back I would cancel the entire policy."

Several weeks later, on July 21, 1958, the agent responded to the insured as follows:

> "Since you indicated in your application for policy number 52150 that you had applied for army aviation, the policy was issued with a Limitation Due

to Aviation Hazard included. The policies which you mention in your post card as not having undergone an increase in premium due to your flight activity were undoubtedly issued before you applied for aviation training, and consequently without the Limitation Due to Aviation Hazard. Had these companies known at the time of issue of your policies that you would become a student pilot, these policies too would have been issued with a Limitation Due to Aviation Hazard, and there would have been an increase in premiums for extra aviation coverage upon your beginning of pilot training.

"Your policy number 52150 has a face amount ot $20,000 for the first 20 years and the extra aviation premium per month at the rate of $ .50 per month per $1000 of insurance therefore amounts to $10.00. We should like to point out that the rate of $ .50 per month per $1000 insurance is by no means excessive as compared to the rates charged by other insurance companies.

"Again we wish to apologize for having originally quoted you the wrong rate.

"Unless we hear from you further, extra aviation coverage will not be added to your policy."

Subsequently, on August 19, 1958, said agent again wrote to the insured informing him that, "Inasmuch as we have had no further word from you in regard to adding, the aviation coverage to the above policy, we are enclosing our voucher number 22595 for $10.00. This represents your personal remittance on this policy." The voucher was dated August 15, 1958, made payable to the insured, and cashed by him on or about August 27, 1958.

The plaintiff claims that she is entitled to judgment, because when the insured was killed, he was a "passenger" in an aircraft owned and operated by the United States

Government; therefore, his death was clearly within one of the exceptions to the aviation rider.

The case of Continental Casualty Co. v. Warren, (1953) 254 S.W.2d 762, decided by the Supreme Court of Texas, is cited in support of that position. There, the Court, in holding that the pilot was covered by a policy indemnifying the insured for loss resulting from injury sustained in consequence of "riding as a passenger" in a specified airplane owned by the insured and piloted by an authorized person, said that the words "as a passenger" could be construed to mean "as an occupant," and concluded that the special rule of construction governing insurance cases requires that exceptions and words of limitations be strictly construed against the insurer, and favors a solution that would include rather than exclude the pilot. There is no language in the aviation rider involved herein which would compel a different conclusion, and "the intent of the policy to exclude the pilot is not so certain as to make it wholly unreasonable to say that he was included." Since the Warren case, supra, was decided more than four years prior to the date the policy herein was issued, it is even more significant that the insurer, after being put on notice, did not exclude the pilot "beyond question, by the simple insertion of a phrase, such as, 'and not as the pilot.' "

The defendant, however, points to the fact that the insured was admittedly on a training flight, and says that according to the plain language of the aviation rider his death was excluded from the coverage.

Plaintiff, on the other hand, argues that such language can reasonably be interpreted to mean that it applies in the event the death of the insured was due to any aviation training, *except* as a result of travel as a passenger on an aircraft owned and operated by the United States Govern-

ment; that the insurance company chose the words and is bound by them; that the language of the insurance policy which is susceptible of more than one construction should be interpreted strictly against the insurer and liberally in favor of the insured; and that since the insured, as the pilot, under the law, was a "passenger" on a government owned and operated aircraft, his death was covered by the policy, despite the fact that he was on a night training flight.

It certainly cannot be said that plaintiff's argument is unreasonable, even if it could be said that the defendant's interpretation constitutes "a more likely reflection of the intent of the parties." Continental Casualty Company v. Warren, supra. Neither Green v. Mutual Benefit Life Insurance Company, (1st Cir.) 144 F.2d 55, nor McCann v. Mutual Life and Accident Insurance Company, Texas Civil Appeals, 226 S.W.2d 177, error refused, relied upon by the defendant, is in point, because there was no ambiguity in the aviation rider involved in either case. There is little, if any, similarity between those riders and the one now before this Court, except that all three relate to risks incident to aviation.

The next contention urged by the defendant is that even if an ambiguity in the rider existed, the conduct of the parties long before the accident demonstrates that the insured understood the terms of the contract, and knew that it would not cover his death resulting from any training flight undertaken by him as the pilot of a government owned and operated aircraft. The case of Sulzbacher v. Travelers Insurance Company, 137 F.2d 386, is cited in support of this proposition. In that case, however, there was no question but that the conduct of the insured was, beyond any doubt, directed toward securing an amendment in order to gain protection against the hazards of aerial navigation which the original policy expressly excluded;

while, in the case at bar, the insured already had the coverage now claimed, when the correspondence with the company was begun by him, and there is considerable doubt as to just what he did know or understand about the policy.

It must be conceded that the conduct of the insured suggests the possibility that he did not think his training as a student pilot was covered by the policy, but the conclusion that he knew and understood that he did not have such coverage does not follow therefrom as a matter of law. He might just as reasonably have had in mind a desire for additional coverage which would include, for example, travel in a privately owned plane, in a non-scheduled air liner, and in a plane owned by a flying school training flyers under government contract, none of which was then covered by the policy. The cancellation of the aviation rider would have accomplished this and given the "extra" coverage referred to by the agent for the company, because it would have left him with no aviation restrictions whatever.

True, the tenor of the agent's letter of July 21, 1958, almost ten months after the effective date of the policy, was to the effect that coverage of a student beginning pilot training would call for extra aviation coverage and an increase in premiums, but the record does not reveal exactly what the insured himself understood with respect to the nature and extent of the coverage he already had. It would be necessary, therefore, to indulge in both speculation and conjecture in order to conclude that he knew and understood that he would not be covered as the pilot on a training flight, even though he occupied a government owned aircraft.

Under the circumstances, I do not believe that the evidence justifies a finding that the insured knew and understood that his death would not be covered by the insurance policy he held with the defendant company.

I conclude, therefore, that the language of the aviation rider is ambiguous; that the insured, as the pilot of a government owned and operated aircraft was a "passenger" therein, within the meaning of the rider; that the insured's death was within one of the exceptions set forth in said rider; and that his conduct did not show that he had a contrary understanding. Hence, the plaintiff is entitled to recover of and from the defendant the sum of $20,000.00, representing the face amount of the policy, the 12% penalty provided by law, and $3,500.00 attorney's fees, stipulated by the parties to be a reasonable amount, or a total sum of $25,900.00, and judgment will be entered accordingly. The defendant, of course, is entitled to a refund of $366.00, representing the premiums paid by the insured deposited by the defendant in the registry of the Court.

No findings of fact and conclusion of law other than as set forth in this opinion will be filed.

Adrian A. Spears
United States District Judge

Filed: December 27th, A. D. 1961.

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[2]254 S.W. 2d 764.
[3]Page 766.

APPENDIX II

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19531

UNITED SERVICES LIFE INSURANCE COMPANY,
Appellant,

versus

JOAN FLORES DELANEY,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(September 26, 1962)

Before CAMERON, WISDOM and GEWIN, Circuit Judges.

CAMERON, Circuit Judge: Robert H. Delaney was killed May 8, 1951 while he was on a night training flight in an Army airplane of the United States, while he was pilot and sole occupant of the plane which crashed. At the time of his death he was the insured in a life insurance policy issued by appellant United Services Life Insurance Company in which his wife, Joan Flores Delaney, appellee, was the beneficiary. She made demand on the Insurance Company for the payment of $20,000.00, the face of the policy, and upon the rejection of her demand, brought this action to recover that amount, together with statutory damages, attorneys' fees and interest. Appellant had, before

suit, tendered to her the amount of premiums which the deceased had paid on the policy, and it paid the amount into court upon appellee's refusal of the tender and the beginning of this civil action.

The appellant plead that it was not liable under its policy on the ground that "the provisions contained in the LIMITATION DUE TO AVIATION HAZARD portion of the policy, are clear and unambiguous in providing that the liability of the Company under certain specified circumstances shall be limited to the premiums paid or the net reserve at the time of death." The Company plead further that, even if the language of the policy, taken alone, should be considered ambiguous, such ambiguity was removed by the actions of the parties and the construction placed thereon by them.

The case was tried by the court below without a jury upon admissions of, and stipulations as to the, facts by the two parties. Upon a written opinion filed by the court, now published in 201 F.Supp. 25, judgment was entered in favor of appellee and against appellant for the sum of $25,900.00, which by subsequent order was corrected to the sum of $28,600.00. We copy a portion of the opinion of the court below as epitomizing the facts before it and its decision upon them:

"In his application dated September 28, 1957, the insured, at that time a Lieutenant in the United States Army, stated, among other things, that he had applied for army aviation; that he had been accepted in the Judge Advocate's branch; that he did not then desire aviation; and that he would decline aviation if he was accepted. By an amendment to the application, dated the same day, the following provision was added:

"'LIMITATION DUE TO AVIATION HAZARD

"'If this policy shall become a claim of death of the insured due to any service, training, travel, flight, ascent or descent in, on, or from any species of aircraft at anytime, *except death resulting from travel as a passenger on an aircraft owned and operated by the United States Government* or as a passenger on a scheduled passenger air service regularly offered between specified airports, the liability of the company under this policy shall be limited to the premiums paid hereunder or to the then net reserve at time of death, if greater; any provision in this policy to the contrary notwithstanding. . . .' [Emphasis supplied.]

"When the policy was issued, it contained a rider incorporating the provision above quoted, and the words 'Limitation Due to Aviation Hazard included,' were typed on its front and back. It was in full force and effect when the insured died on May 8, 1959 of injuries received as the pilot and only occupant of an aircraft owned and operated by the United States Government, which crashed near Spring Branch, Texas, while on a night training flight. At the time of his death, the insured was receiving incentive pay and was on duty as a regular officer. . . .

"The plaintiff claims that she is entitled to judgment, because when the insured was killed, he was a 'passenger' in an aircraft owned and operated by the United States Government; therefore, his death was clearly within one of the exceptions to the aviation rider.

". . . There is no language in the aviation rider involved herein which would compel a different conclusion, and 'the intent of the policy to exclude the pilot is not so certain as to make it wholly unreasonable to say that he was included.' Since the Warren Case . . . was decided more than four years prior to the date the policy herein was issued, it is even more significant that the insurer, after being put on

notice, did not exclude the pilot 'beyond question, by the simple insertion of a phrase, such as, "and not as the pilot." '

"The defendant, however, points to the fact that the insured was admittedly on a training flight, and says that according to the plain language of the aviation rider his death was excluded from the coverage.

"Plaintiff, on the other hand, argues that such language can reasonably be interpreted to mean that it applies in the event the death of the insured was due to any aviation training, *except* as a result of travel as a passenger on an aircraft owned and operated by the United States government; that the insurance company chose the words and is bound by them; that the language of the insurance policy which is susceptible of more than one construction should be interpreted strictly against the insurer and liberally in favor of the insured; and that since the insured, as the pilot, under the law, was a 'passenger' on a government owned and operated aircraft, his death was covered by the policy, despite the fact that he was on a night training flight.

"It certainly cannot be said that plaintiff's argument is unreasonable, even if it could be said that the defendant's interpretation constitutes 'a more likely reflection of the intent of the parties.' . . ."

Based upon these holdings and its findings that while the conduct of the insured suggested the possibility that he did not think his training as a student pilot was covered by the policy, the conclusion that he knew and understood that he did not have such coverage does not follow therefrom as a matter of law, the trial court rejected the defenses interposed by the Insurance Company and held that the appellee was entitled to recover the face of the policy, $20,000.00, with interest, the twelve percent penalty pro-

vided by law, and $3,500.00 attorneys' fees stipulated by the parties to be reasonable.

We gather that the trial court was constrained to its conclusion by the decision of the Supreme Court of Texas—it being conceded that Texas substantive law governs—in *Continental Casualty Co.* v. *Warren*, 1953, 254 S. W. 2d 762, affirming the decision of the Court of Civil Appeals of Texas, Fort Worth, 1952, 248 S. W. 2d 315, which, in turn, reversed the judgment of the District Court of Harris County, Texas. After a close study of that case we conclude that the principles of law established by it control the decision of this case and we affirm the judgment of the court below.

The *Warren* case grew out of a suit based upon a policy indemnifying Warren's employer against loss resulting from injury sustained by him in consequence of riding as a passenger in a Beechcraft Aircraft owned by the employer. The insurance company answered the suit brought by Warren's widow and urged a special exception to her petition "asserting that since said petition alleged that Jesse C. Warren . . . was piloting the aircraft when the fatal injury occurred, he was not in fact riding as a passenger and, therefore, was not covered."[1] The District Court of Harris County sustained this special exception, but its action was reversed by the Court of Civil Appeals.

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[1]The exact language of the policy involved in that case is this:

> " 'Injury' wherever used in this policy means bodily injury caused solely by an accident occurring while the policy is in force and resulting directly and independently of all other causes in loss covered by the policy, provided such injury is sustained by the insured person in consequence of riding as a passenger in, boarding, alighting from, making a parachute jump from (for the purpose of saving his life) or being struck by the twin engine six passenger-place Beechcraft Aircraft . . . which aircraft . . . is piloted by a person who holds a valid and current certificate of competency of a rating authorizing him to do so." 248 S.W. 2d 315.

We bring together a portion of two paragraphs (pages 316-317) of the Court of Civil Appeals' opinion which constitute the gist of its holding:

> "Since the insurance policy before us for construction did not specifically exclude the pilot from coverage, we must therefore resort to fundamental rules of interpreting life insurance policies which have been handed down by our courts, such as, terms of the policy must be interpreted in the light of common sense; that the language of an insurance policy which is susceptible of more than one construction should be interpreted strictly against the insurer and liberally in favor of the insured. . . . that any ambiguity in an insurance contract drafted by the insurer will be resolved in favor of the insured and against the insurer. . . .
>
> "If the parties intended for the contract to eliminate coverage of the pilot, it could have so provided by using some reasonable term, such as 'exclusive of pilot,' or, 'this policy does not cover the pilot, mechanics or any person riding in the plane employed by the assured to manipulate, to work on, to supervise, or to assist in operation of the plane.'"

In addition to the quoted language, the Court of Appeals devoted nearly half of its opinion to a careful consideration of the meaning of the word "passenger," quoting from dictionaries and textbooks, and concluding that, as used in the policy before it, the word "passenger" is used "in the ordinary sense with the word 'occupant.'"

The Supreme Court of Texas went into the decision of the Court of Civil Appeals at great length and with great particularity, and what the Supreme Court intended to hold is brought into sharp focus by the vigorous dissenting opinion in which four of the justices concurred. The dissenting opinion emphasized that, if Warren was to be

protected while he was piloting the plane, the use of the words "piloted by a duly licensed pilot" is surplusage and without meaning. It, too, explored the authorities and quoted from a decision by the United States Supreme Court and from the Uniform State Law for Aeronautics to demonstrate that a plane passenger is considered to include only "any person riding in an aircraft, but having no part in its operation."

The dissent also pointed out that the policy contained a statement that it was issued in consideration of the payment of "an annual term premium of $750.00, calculated at the rate of $125.00 per annum for each passenger-place in the aircraft herein described." It also gave weight to the fact that the limit of indemnity for each person was $25,000, and for each collision was $150,000, emphasizing that the latter figure was the product obtained by multiplying $25,000 by six, the number of passenger seats in the plane.

Notwithstanding this determined position taken by four members of the court, the Supreme Court of Texas, taking note of the foregoing argument, held categorically (254 S. W. 2d 763):

> "But for the fact that insurance policies are governed by the special rule of construction, which is a familiar part of our jurisprudence, we might, indeed, hold either that the interpretation against liability of the insurer should prevail or that, the policy being ambiguous, there is a fact issue as to what was intended. Yet the rule, of course, applies, and under it the insurer may not escape liability merely because his or its interpretation should appear to us a more likely reflection of the intent of the parties than the interpretation urged by the insured. The latter has to be no more than one which is not itself unreasonable. . . . For all the particular considerations rea-

sonably indicating that the pilot is not covered, there are yet others making it not unreasonable to say that he is, and that the insurer is therefore liable."

The majority acknowledged that each of the arguments advanced by the dissenters had the appearance of validity, taking up each facet of the dissenting opinion and disposing of its arguments one by one. It emphasized repeatedly the firmly established Texas rule that those who sell insurance policies and have the privilege of writing them had better use the clearest of language if they would escape liability to claimants who, under the common parlance of the layman, are able to bring themselves within the ambit of the risks insured against by any argument approaching reasonableness.

Witness the expressions appearing in the course of the majority's answer to the arguments of Continental as adopted by the dissenting opinion: ". . . It thus operates as an indirect sort of exclusion or exception clause and should accordingly be very clear insofar as it is to deny application of the insurance." And again, "But, there is no such clear exclusion of the pilot anywhere in the policy, and the insurer thus has to bottom its position on the risk or 'injury' definition proviso . . ."[2] Further, "The noun 'pilot' nowhere occurs, and the participle 'piloted' could just as well have been 'driven' or 'flown';" and, "The inference that the pilot is excluded from coverage is only an inference and a rather remote one."[3] And the majority opinion ends with this sentence:

"Since, therefore, the intent of the policy to exclude the pilot *is not so certain as to make it wholly unreasonable to say that he was included*, the judgment

of the Court of Civil Appeals so holding should be affirmed and it is so ordered." [Emphasis added.]

A consideration of the two appellate decisions in *Continental* v. *Warren* leaves us convinced that the facts of this case cannot be distinguished from the controlling facts of that case, and that, sitting as we are as a Texas Court, we are bound to follow that decision and hold that Robert H. Delaney was not excluded from coverage by the "Lmitation Due to Aviation Hazard" provision of his insurance contract.

As in *Warren*, the noun "pilot" nowhere occurs in the limitation. With the teachings of *Warren* before it, the appellant could have eliminated the insured from coverage while he was piloting a government plane by the use of a few simple words. It did not do so and, under the Texas rule, it cannot escape coverage by the insertion of the vague and general wording of the limitation upon which it relies.

The court below, sitting as finder of the facts as well as judge of the law, set forth the correspondence between the insured and the insurance company, and concluded that there was considerable doubt as to the meaning of the writings which passed between the two. It concedes that the conduct of the insured "suggests the possibility that he did not think his training as a student pilot was covered by the policy, but the conclusion that he knew and understood that he did not have such coverage does not follow therefrom as a matter of law. He might just have reasonably have had in mind a desire for additional coverage which would include, for example, travel in a privately owned plane, in a non-scheduled airliner, and in a plane owned by a flying school training fliers under government contract, none of which was then covered

by the policy." The court concluded, therefore, that the evidence did not justify finding that the insured understood that his death while piloting a government plane would not be covered by the insurance.

In our opinion the trial court was justified in placing the construction it did upon these writings. At all events, they do not justify the holding that they were any more than the statements of the respective contentions of the insurer and the insured; and nothing contained in the writings could be construed as cancelling the insurance policy we have held to be in force, or as surrendering any rights vested in the insured or his beneficiary under its terms.

Being of the opinion that the judgment of the court below is right, it is AFFIRMED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

I would hold the parties to the plain meaning of everyday words used in their ordinary sense in an unambiguous contract.

We do not have here a question of the applicability of a broad, established principle of state law. We have a narrow little question turning on the extension to this case of language of a particular insurance policy interpreted by a Texas court in a single case, *Continental Gas v. Warren,* 1953, Tex. S. Ct. 254 S. W. 2d 762. When a litigant, waving Erie and pointing to a single precedent, demands a there's-but-to-do-or-die decision that "black" is "white", "yes" is "no", or a "passenger" is a pilot operating an aeroplane in flight, the certainty that the single precedent does indeed compel an Erie decision should be a lot more evident than is evident to me in this case.

I would distinguish Warren. In that case the policy was ambiguous in several respects. There is no ambiguity here, unless it can be said that thanks to Warren the word "passenger" is always ambiguous and may in an insurance policy always be taken to include a "pilot". A review of the opinion shows that Warren stands for no such proposition. Its holding is rigorously restricted to a construction of a policy that, read as a whole, was equivocal.

The important fact in Warren was that the policy was issued to a business firm and was intended to *insure all of the firm's employees*. The Texas Supreme Court emphasized this fact at the start and throughout its opinion:

> "We start with the initial broad statement that 'every officer, employee or guest' of the policyholder is, in the very words of the insurer itself, an 'insured person'. This naturally suggests to the ordinary reader that all of the class mentioned—which, of course, includes the pilot—is insured for such risks and with such limitations as may follow in the rest of the policy."

Thus, in Warren the pilot was clearly an "insured person" in a large group all of whom apparently were meant to be covered under the policy. The conflict between this provision and the clause dealing with the injury covered produced an ambiguity absent here.

After pointing out again that the pilot was an "employee" and "in the insurer's own words, 'an insured person' ", the Texas Supreme Court said that the question was whether it is "beyond the broad pale of reason" to say that such an insured person is excluded by succeeding provisions in the policy. The majority, through Chief Justice Garwood, found "no such clear exclusion"; the insurer had to bottom its position on the definition of risk

or injury covered. This definition allows recovery for injury "sustained by the insured person as a consequence of (1) riding as a passenger in, (2) boarding, (3) alighting from, (4) making a parachute jump from (for the purpose of saving his life), or (5) being struck by" the plane. (Numerals supplied.) The court reasoned that the pilot "would be covered because (a) he is 'an insured person' under the initial paragaph and (b) the insured risk came to pass"—unless "the mere word 'passenger' excluded him." The court alluded to broad definitions of "passenger", but it did not base its holding on the broadness of the meaning of the word. On the contrary, the court "conceded that the full phrase, 'riding as a passenger in', does suggest a meaning of passenger as a non-operative of the plane". The court relied on the policy as a whole; "other provisions of the policy have logical bearing on the intended coverage". Going back to the enumeration of the five risks, the court found that, "grammatically speaking, any requirement of the insured person being a passenger in the sense of non-operator applies only to the 'riding risk' and to none of the other four". The court said:

> "Thus keeping 'as a passenger' in the place where the insurer itself firmly located it, the result is that as to all the five risks, except possibly that of 'riding,' every non-passenger 'insured person' would be covered, if he were injured by the risk, and this, of course, includes the pilot as an 'employee' of the policyholder and accordingly 'an insured person.' If we say that the pilot is a non-passenger and thus excluded from the 'riding' risk, we reach the extraordinary result that he is covered, for example, for a parachute drop, and yet not covered for a crash of the plane. . . . If a construction of non-liability under one part of a contract would operate to produce an absurd result from the contract as a whole, that fact has clear logical

relevance to whether the construction should or should not be adopted. It is interesting to note that, on the oral argument, the insurer's only explanation of this apparent oddity of covering the pilot for one risk and not another was that "as a passenger' must be read into each separately enumerated risk. If that is so, the insurer is placed in the rather clearly untenable position, that no 'insured person'—plane operator or otherwise—is insured unless he be a 'passenger.' If it is not so, we have a policy that both excludes and includes the pilot, unless we construe 'passenger' in the sense of 'occupant' and thereby include the pilot and other 'insured persons' for all the risks."

In view of the language in the Continental Casualty Co. policy, it is not surprising that the Texas court resolved the ambiguity in favor of the "insured person", the employee. The case stands only for the proposition that, construing the entire policy, *the mere word "passenger" cannot be said to exclude the pilot. The court did not hold that a "pilot" is a "passenger".*

That however, is what the plaintiff would have this Court hold, notwithstanding an otherwise unambiguous policy. In this case when Robert Delaney, the insured, made his application for insurance, he was a lieutenant in the United States Army. He had applied for Army aviation training. Delaney filled out and signed an insurance form, *"request for Amendment"* for a provision entitled, *"Limitation Due to Aviation Hazard"*. This amendment contains the critical language:

"If this policy shall become a claim by death of the insured due to any service, training, travel, flight, ascent or descent in, on or from any species of aircraft at any time, except death resulting from travel as a passenger on an aircraft owned and operated by the United States Government or as a passenger on a licensed aircraft operated by a licensed passenger

> pilot on a scheduled passenger air service regularly offered between specified airports, the liability the Company under this policy shall be limited to the premiums paid hereunder or to the then net reserve at time of death, if greater; any provision in this policy to the contrary notwithstanding. . . ."

The *Request for Amendment* also contains a statement reading:

> "I certify that I have done no flying except as a passenger under conditions outlined since .....none ....."

Typed on the front and back of the policy were the words "Limitation Due to Aviation Hazard included".

At the time of his death, Lieutenant Delaney was the pilot and sole occupant in an official Army aircraft under the operational control of the Second Armored Division, Fort Hood, Texas. The official Army report stated as the cause of his death: "Injuries. Officer was pilot of an aircraft which crashed while on a night training flight". He was a "regular" officer "on duty", receiving "incentive pay for flying".

In the *Warren* case, the Court could not have arrived at the conclusion it reached without finding that the policy as a whole was ambiguous. The insurer's construction of the one word "passenger" conflicted with a reasonable construction of other provisions and was inconsistent with the purpose and meaning of policy intended to cover all employees. On the other hand, here the critical words are clear; the clause does not conflict with other policy provisions; the insurer's view of the meaning of the clause is consistent with the policy and the construction the insured himself placed on the policy; there is good reason to distinguish between a training

flight piloted by Delaney, an inexperienced pilot who had requested training, and a flight as a passenger on a government operated plane or a scheduled passenger plane. There is therefore no occasion to resort to the familiar principle that equivocal words should be construed against the insurer.

There is not the shadow of a doubt, in my mind, that the parties *said* and intended to say that the policy excluded coverage for death resulting from injuries to an Army pilot in a training flight. We have no license to change the contract. Here, *Warren* is only a ghost that casts no shadow.

APPENDIX III

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19531

UNITED SERVICES LIFE INSURANCE COMPANY,
Appellant,

versus

JOAN FLORES DELANEY,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(March 31, 1966.)

EN BANC before TUTTLE, Chief Judge and BROWN, WISDOM, GEWIN, BELL, THORNBERRY, and COLEMAN, Circuit Judges.

PER CURIAM: The District Court rendered judgment in this case for appellee, the beneficiary under a contract of life insurance on her husband who was killed while on a night training flight in an army airplane which he was piloting and in which he was the sole occupant. A divided panel of this court affirmed. *United Services Life Insurance Company* v. *Delaney*, 5 Cir., 1962, 308 F.2d 484. The case was considered *en banc* on motion for rehearing. We then abstained from further consideration of the matter and instructed appellant to institute a declaratory judgment proceeding in the Texas State courts for a determination of coverage, the single issue in the case. *United Services Life Insurance Company* v. *Delaney*, 5 Cir., 1964, 328 F.2d 483, cert. den., 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed.2d 298. The subsequent declaratory judgment action instituted by appellant in Bexar, Texas was dismissed for lack of jurisdiction and the Supreme Court of Texas affirmed. *United Services Life Insurance Company* v. *Delaney*, Tex., 1965, 396 S.W.2d 855. The affirmance was on the ground that the case was still pending in the federal courts and Texas State courts did not have constitutional authority to render an advisory opinion. For a history of the state court proceedings in two related cases, *Paul Revere Life Insurance Company* v. *First National Bank in Dallas, Administrator*, and *St. Paul Mercury Insurance Company* v. *Price*, see our opinions this day rendered in those cases. .... F.2d ...., and .... F.2d .... (No. 19,604 and No. 20,396).[1]

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[1]Judge Cameron was a member of the panel originally hearing this case. 308 F.2d 484. He is now deceased. Judges Hutcheson, Rives, and Jones have become Senior Judges since the abstention opinions. Judges Thornberry and Coleman have become members of the court since the abstention opinions and they participate by virtue of 28 USCA, § 46(c).

The opinion of the District Court and the affirmance by the panel of our court first considering this case resulted from a Texas authority deemed controlling. *Continental Casualty Company* v. *Warren*, Tex., 1953, 254 S.W.2d 762. We distinguished that case in our decision of today in the *Paul Revere* case. As was true there, we find nothing outside the exclusionary language of the policy which logically bears on the intended coverage so as to create an ambiguity in the exclusionary language. Thus any ambiguity must be found in the language of the exclusion itself. It excludes coverage ". . . except death resulting from traveling as a passenger on an aircraft owned and operated by the United States Government or as a passenger on a scheduled passenger air service regularly offered between specified airports . . .".

We held in *Paul Revere* that "passenger" as used in a similar context did not include a pilot. The husband of Mrs. Delaney was the pilot of the plane in which he met his death. For the reasons stated in the dissenting opinion of Judge Wisdom on the first appearance of this case, 308 F.2d 484, 488, and because it cannot be distinguished from our decision of today in *Paul Revere*, appellant's motion for rehearing is granted, the decision of this court of September 26, 1962 is vacated, the judgment of the District Court is reversed, and the case is remanded for further proceedings not inconsistent herewith.

MOTION FOR REHEARING GRANTED; PRIOR DECISION VACATED; REVERSED and REMANDED.

GEWIN, Circuit Judge, Dissenting:

For reasons stated in my dissent in the case of *Paul Revere Life Insurance Company* v. *First National Bank in Dallas, Administrator*, decided on this date, ... F.2d . . . ., I adhere to the majority opinion originally rendered in this case, *United Services Life Insurance Company* v. *Delaney* (5 Cir. 1962, 308 F.2d 484).

I respectfully dissent.

APPENDIX IV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19604

PAUL REVERE LIFE INSURANCE COMPANY,
Appellant,

versus

FIRST NATIONAL BANK IN DALLAS, ADMINISTRATOR OF THE ESTATE OF LOY THOMAS BROWN, DECEASED,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(March 31, 1966.)

EN BANC before TUTTLE, Chief Judge and BROWN, WISDOM, GEWIN, BELL, THORNBERRY, and COLEMAN, Circuit Judges.

BELL, Circuit Judge The issue in this case is whether coverage of an airplane pilot is afforded under an insurance contract which excepts death or disability resulting from flight in an aircraft except as a passenger on a civilian plane. In an *en banc* opinion dated February 4, 1964, we abstained from deciding the issue in this case, and in *United Services Life Insurance Co.* v. *Delaney*, another case involving a similar issue, and instructed the appellants in the two cases to institute declaratory judg-

ment proceedings in the Texas State courts for determination of coverage, a state question which presented the single issue in each of the cases. *United Services Life Insurance Co.* v. *Delaney,* 5 Cir., 1964, 328 F.2d 483, cert. den., 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed.2d 298. Following this decision, a panel of the court abstained in a third case for the same reasons. *St. Paul Mercury Insurance Company* v. *Price,* 5 Cir., 1964, 329 F.2d 687.[1]

A declaratory judgment proceeding was then instituted by appellant in this case in the District Court of Dallas County, Texas, and that court rendered judgment to the effect that the death of the insured was not covered by the policy in question. The appellant in the *St. Paul Mercury* case obtained a judgment in the District Court of El Paso County, Texas, to the same effect. In the *United Services Life Insurance Company* case, the District Court of Bexar County, Texas, held that it had no jurisdiction to hear the petition for declaratory judgment and dismissed. The dismissal was affirmed by the Court of Civil Appeals of Texas, *United Services Life Insurance Company* v. *Delaney,* 1964, 386 S.W.2d 648; and by the Texas Supreme Court, 396 S.W.2d 855. The *St. Paul Mercury* and the *Paul Revere* proceedings were dismissed for want of jurisdiction following the Supreme Court decision.

Thus each of the three cases are again before this court for decision. We here consider only the appeal of *Paul Revere Life Insurance Co.*

Decedent purchased three insurance policies under a package plan from Paul Revere Life Insurance Company.

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[1]Judges Hutcheson, Rives, and Jones have become Senior Judges since the absention opinions. Judges Thornberry and Coleman have become members of the court since the abstention opinions and they participate by virtue of 28 USCA, § 46(c).

The first was a life policy in the principal amount of five thousand dollars. The second was an accident policy with coverage of ten thousand dollars in the event of death, while the third was an accident policy of another type contracting to pay one thousand dollars in the event of death. It was stipulated that decedent was killed while piloting, operating and in control of a private plane which crashed. His wife and three other passengers in the plane were also killed. The plane, a Model A-35 Beech Bonanza was owned by Cross Country Flying Club, Inc.

The coverage under the life policy was paid, but appellant refused to pay under the accident policies on account of the following exception contained in each of the policies:

> "I. Exception. This policy also does not cover death or disability resulting from flight in aircraft except as a passenger on a civilian plane under Clauses A, B, and C and as a fare-paying passenger on a civilian plane under Clause D. . ."

Clauses A, B, and C of the ten thousand dollar policy are reprinted in pertinent part in the margin for clarity.[2]

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[2] "SPECIFIC LOSSES

"A. If such injuries result in continuous total disability from the date of the accident and within six months of the accident in any of the losses named below, the Company, in addition to any other indemnity payable under this policy, will pay for one and only one (but in any event the larger) of such losses.

"Death ..... The Principal Sum

* * *

"MONTHLY ACCIDENT INDEMNITIES

"B. TOTAL DISABILITY—ACCIDENT. If such injuries result in continuous total disability within ninety days from the date of the accident, requiring the regular and personal attendance of a licensed physician, the Company will pay during the continuance of such disability—Two Hundred—Dollars per month so long as the insured shall live and remain so disabled. The maximum benefit period for any such disability commencing after age sixty-five, if covered under this policy, is set forth in Clause G.

It is to be noted that A, B, and C are the regular coverage clauses while D provides double indemnity where the accident is to a public conveyance and the insured is traveling therein as a fare-paying passenger. The one thousand dollar policy contained no double indemnity clause.

It was also stipulated that decedent was a citizen and resident of the State of Texas when he purchased the insurance in question, that the policies were contracted for and issued to him in the State of Texas and that he was continuously a citizen and resident of Texas from the date the policies were issued until the date of his death. The plane crashed in Oklahoma.

The District Court granted summary judgment for appellee in the amount of the coverage together with penalty and attorneys' fees. The holding was premised on the view of the District Court that the case of *Continental Casualty Company* v. *Warren,* Tex. 1953, 254 S.W.2d 762 was controlling. We disagree and reverse.

The facts, including the policy language, in *Continental Casualty Company* v. *Warren, supra,* were wholly different

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"C. PARTIAL DISABILITY—ACCIDENT. If such injuries shall continuously from the date of the accident partially disable the insured, or if such partial disability immediately follows total disability for which indemnity is payable under Clause B, and the disability in any such case requires the regular and personal attendance of a licensed physician, the Company will pay one-half of the indemnity provided under Clause B per month for the period of such disability, for not exceeding six months.

"D. DOUBLE INDEMNITY—TRAVEL ACCIDENTS. If such injuries are caused by an accident to a public conveyance while the insured is traveling as a farepaying passenger therein, or by an accident to an automobile of pleasure design when it is being used for pleasure purposes only and while the insured is traveling therein, any indemnity payable under Clause B as a result of such injuries will be doubled during the period for which such indemnity is payable, for not exceeding one year.

* * *"

from those in the instant case. The majority of the Texas court deciding *Warren* deemed an ambiguity to exist and applied the rule of construing the ambiguous language more strongly against the insurer, and coverage was thus found. There is no ambiguity here. The facts are undisputed. And where the applicable language of the policy is clear and unambiguous, it must be treated as in any other contract; giving such meaning to the language as will carry out and effectuate the intention of the parties. It is only where there is uncertainty as to the meaning of a contract or some portion thereof that rules of construction are to be applied. *General American Indemnity Company* v. *Pepper,* Tex. 1960, 339 S.W.2d 660.

Here the appellant agreed to pay subject to the provisions and limitations contained in the policy. One of these was that no payment would be made for death resulting from flight in an aircraft except as a passenger on a civilian plane. It was necessary for appellee to show that decedent was a passenger. Any question regarding the type of plane and the status of decedent in the plane, may be eliminated. He was killed in a civilian plane, but he was the pilot of the plane. The question turns on whether he was a passenger as well.

The District Court created an ambiguity on the basis of the difference between a passenger under Clauses A, B, and C, and a fare-paying passenger under Clause D, the double indemnity provision. Of course, there is a clear difference in the risk especially when the injuries sustained under Clause D must result from an accident ". . . to a public conveyance." Moreover, the double indemnity clause is not applicable to death coverage. It merely doubles the disability payment under Clause B. These differences in risk and coverage do not in the least give rise to an ambiguity, but taking this *non sequitur* as a base, the

District Court applied the rule of construction that an insurance policy must be construed more strongly against the insurer and reached the conclusion that decedent pilot was riding as a passenger.

The fallacy of assuming the ambiguity so as to place the case within the strict construction rule of *Continental Casualty* led to the error. In that case the policy was issued to the employer of the decedent pilot to cover officers, employees and guests. The critical language of that policy was:

> "That it will indemnify the employer for loss resulting from *injury* sustained by an officer, employee or guest of the employer (herein individually called insured person); to the extent herein provided.
>
> "*'Injury'* wherever used in this policy means bodily injury caused solely by an accident occurring while the policy is in force and resulting directly and independently of all other causes in loss covered by the policy, *provided such injury is sustained by the insured person in consequence of riding as a passenger in, boarding, alighting from, making a parachute jump from (for the purpose of saving his life) or being struck by the twin engine six passenger-place Beechcraft Aircraft D18S, License NC 80496,* owned by the employer, which aircraft at the time of the accident is flying with the consent of the Employer in or between the Continental United States, Mexico and Canada and is piloted by a person who holds a valid and current certificate of competency of a rating authorizing him to do so." [emphasis added]

The ambiguities in this language with respect to the question in issue are clear even to a casual reader. The insurance company argued that it was implicit that only passengers on planes were included. The majority of the court thought that the term "passenger", mentioned only

in the "injury" definition, related to the riding risk and not to the others. Thus, for example, the pilot might be covered while making a parachute jump but not while continuing as pilot. The strong dissenting opinion urged that there was no ambiguity and that the pilot was excluded from coverage.

The conclusion reached was that the term "passenger" was used in the sense of "occupant" and that the pilot, an occupant, was not excluded. This followed from a construction of the contract as a whole. It was an airplane accident policy insuring the officers, employees and guests of the employer-owner of a particular plane. The pilot was included as a employee and it was necessary for the insurance company to show that he was excluded. Any exclusion had to be found in the risk coverage which was contained under the definition of "injury". The majority conceded that the phrase "riding as a passenger in" suggested a meaning of "passenger" as a non-operative of the plane. They said that the other language in the contract which had logical bearing on the intended coverage had to be considered. This resulted in an ambiguity which made the contract susceptible of more than one construction, and brought into play the rule that it should be interpreted strictly against the insurer who prepared it and liberally in favor of the insured. Once a construction is in order, the insured need only offer an interpretation which is not in itself unreasonable. *Lloyds Casualty Insurer* v. *McCrary*, Texas, 1950, 229 S.W.2d 605. The court did not hold that a pilot is also a passenger. It held that the risk coverage in the particular policy under consideration did not exclude the pilot.

The *Paul Revere* policy language is clear, and it is not disputed that decedent was the pilot of a civilian plane. The coverage excepted death resulting from ". . . flight in air-

craft except as a passenger on a civilian plane." The question is whether the pilot was also a passenger. There is no additional language in the contract, as was the case in Continental Casualty, which has logical bearing on the intended coverage. And we cannot say that the word "passenger" on its face includes the pilot or operator of a plane. The term is not inherently ambiguous when used in its common or popular meaning. The statement of Mr. Justice Stone speaking for the Supreme Court in *Aschenbrenner* v. *United States Fidelity & Guaranty Company*, 1934, 292 U.S. 80, 54 S.Ct. 590, 78 L.Ed. 1137, is analogous:

> ". . . the word 'passenger' . . . has a common or popular meaning. . . . In its usual popular significance the term, when applied to one riding on a train, indicates a traveler, intended to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey."

We hold that common or popular meaning of "passenger" does not include the pilot. The District Court erred in placing its own construction on the contract. The language of the exception was plain. The insurance company was due to prevail.

REVERSED and REMANDED for further proceedings not inconsistent herewith.

GEWIN, Circuit Judge, Dissenting:

The majority should not overrule and reverse the decisions of two United States District Judges from Texas, both of whom have had long and varied experience in deciding Texas law, without citing even one Texas case to support its conclusion on the chief issue here presented. Judge Spears of the Western District is overruled in *United Services Life Insurance Company* v. *Delaney;* and

Judge Davidson of the Northern District in *Paul Revere Life Insurance Company* v. *First National Bank in Dallas*, by opinions rendered simultaneously on this date, ... F.2d . . . ., and . . . . F.2d . . . .

The lame and specious distinction by which the majority opinion undertakes to sweep aside the decisions of these two judges and the controlling case from the Texas Supreme Court, *Continental Casualty Co.* v. *Warren*, 254 S.W.2d 762, affirming the Court of Civil Appeals of Texas, 248 S.W.2d 315, is unwarranted, illogical and insupportable in Texas law.

It is important to remember that the decisions of the two United States District Judges of Texas were rendered independently of each other, at different times and in separate district courts, with respect to different insurance policies. Even so, both reached the same conclusion for substantially the same reason—ambiguity in the meaning of the word "passenger." Both decisions were rendered prior to our decision in *Delaney*, 308 F.2d 484 (1962). If these two United States District Judges are correct, as they surely must be, then the majority is also overruling the decisions of the Court of Civil Appeals of Texas composed of three Texas judges, and five justices of the Supreme Court of Texas, making a total of ten Texas judges who have held the meaning of the word "passenger" to be ambiguous.[1] See *Continental Casualty Co.* v. *Warren*,

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[1]The following schedule of dates is significant:

1952—April 11	—Decision of Texas Court of Civil Appeals in *Warren*
1953—January 18	—Decision of Texas Supreme Court affirming *Warren*
1961—December 27	—Decision by Judge Spears in *Delaney*
1962—February 9	—Decision by Judge Davidson in *Paul Revere*
1962—September 26	—Decision of this Court in *Delaney*
1962—October 26	—Denial of application for rehearing in *Delaney*

Policy Dates in Question

1957—October 1	—Effective date of *Delaney* policy
1958—May	—Effective date of the policy in *Paul Revere*

supra; Delaney v. *United Services Life Insurance Company,* (W.D. Texas 1961) 201 F.Supp. 25. The decision by Judge Davidson is not reported.

I take my stand with the Texas judges on what constitutes Texas law. That is our duty under the Erie Doctrine, whether or not we like the Texas law.

The first PLAIN ERROR of the majority is the following unsupportable conclusion:

> "The term ['passenger'] is not inherently ambiguous when used in its common or popular meaning."
>
> * * *
>
> "We hold that common or popular meaning of 'passenger' does not include the pilot."

The majority opinion is anchored to the two quoted sentences; both are wrong. If the quoted statements are the law of Texas, the following statements from the Texas *Warren* decisions have been overruled; the two are in direct and irreconcilable conflict with each other:

> "We find the word *'passenger' has no universal or inflexible meaning* which will apply to all cases. There is stated in 13 C.J.S., Carriers, § 544, p. 1047: *'It is difficult to lay down a comprehensive definition of the word "passenger,"* or to exhaust in a single statement all the possible circumstances under which the relation of carrier and passenger may exist * * *.' Webster's Twentieth Century Dictionary defines 'passenger' as 'one who passes on his way; a traveler; a pilgrim; a wayfarer; * * *.'" 248 S.W.2d at 316 (Emphasis added)

The Supreme Court of Texas affirmed the foregoing statement by the Texas Court of Civil Appeals and stated in its own opinion that the word "passenger" is ambiguous:

> "Now the mere word *'passenger' cannot be said to exclude the pilot* although, here too, the insurer might have excluded him beyond question by the simple insertion of a phrase such as 'and not as the pilot.' As sufficiently demonstrated in the opinion of the court below, such dictionary definitions as give the word a significance of non-operator of the vehicle concerned *are but one of several definitions given by the same work, while common parlance undoubtedly* uses it at times in the sense of 'occupant' of a private vehicle, as in the familiar expression 'a six-passenger automobile.' We are cited to no decision fixing the meaning to exclude the operator of a private vehicle, which the aeroplane in question here undoubtedly was, and the significance *of 'passenger'* as applied to common carriers has little relevance to a situation where no carriage for hire, public or private is involved." 254 S.W.2d at 764 (Emphasis added)

The error of the majority opinion and the correctness of the Texas decision as to the ambiguous nature of the word "passenger" is further demonstrated by the fact that over 70 pages in *Words and Phrases* are devoted to decisions by hundreds of courts from every geographical area of the nation defining and construing the meaning of the word "passenger" and its various connotations. See Vol. 31A, Words & Phrases, (Perm. Ed.) p. 15, et seq.

Another difficulty with the majority is the fact that they fail to come to grips with the *Warren* decision. They refuse to recognize the question there presented, the defense asserted by the insurance company, and the ultimate holding of the court. I offer the following analysis of the *Warren* decision:

The Question as Stated by the Texas Court:

> "The question raised by appellee's special exception is founded upon *construction to be given the word*

'*passenger*' as used in the 'injury' clause of the policy." (Emphasis added)

The Insurance Company's Defense According to the Texas Court:

"Appellee answered fully and urged a special exception to appellant's petition, asserting that since said petition alleged that Jesse C. Warren, an employee of Callery & Hurt, Inc., *was piloting* the aircraft when the fatal injury occurred, he was not in fact riding as a *passenger* and therefore was not covered." (Emphasis added)

The Holding of the Texas Court:

"However, we note here that the word '*passenger*' is used in general terms and *will not be given the same construction as it usually carries* in connection with cases involving the transportation of persons *for hire*. As we view it, the word '*passenger*' is used here in the ordinary sense with the word 'occupant'. An automobile is usually described in terms of the number of passengers it was built to transport, including the driver, that is, 'a five passenger car,' etc. To some extent, this same ordinary interpretation applies to private airplanes.

"The policy describes the plane in question as being a twin engine six passenger-place Beechcraft aircraft, which statement, no doubt, would be construed by a layman to include a place for the pilot. *The least that can be said is that it is susceptible to two interpretations.*"

* * *

"We find the trial court erred in sustaining appellee's [insurance company] special exception." (Emphasis added)

All of the foregoing quotations become even more pertinent in light of the majority's statement of the question to be decided:

> "The issue in this case is whether coverage of an airplane pilot is afforded under an insurance contract which excepts death or disability resulting from flight in an aircraft except *as a passenger* on a civilian plane." (Emphasis added)

Another SERIOUS ERROR in the majority opinion is a failure to recognize the proper burden of proof. If the insurance company is not liable, it must bring itself within the exclusionary provisions of the policy. Such burden is on the insurance company. The majority has stated:

> "And we cannot say that the word 'passenger' on its face includes the pilot or operator of a plane."

The Texas Supreme Court correctly followed the rule when it stated that there was no decision "fixing the meaning to exclude the operator of a private vehicle"—the airplane in this case. Otherwise stated, it is the burden of the insurance company to show that the insured was excluded from coverage because it is only by the exclusionary clause that the insurance company escapes liability. See opinion by Judge Bell in *State Mutual Life Insurance Co.* v. *Dorsey, et al.* (March 1966) No. 22,480, ... F.2d . . . .[2] Laymen do not write insurance policies. Insurance companies do the writing, they do the selling, and they are experts in the

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[2]Although dealing primarily with the law of Georgia, undoubtedly Judge Bell stated the general rule:

> "We must apply the pertinent principles of law to these facts in determining the validity of the appeals. It is undisputed that Messrs. Robinson and Murphy met their deaths by reason of an accident and State Mutual asserts the exclusion in bar of recovery. The burden is on the insurer in such event to show that the death fall within the contract exclusion."

In dealing with the defense of the insurance company asserting that the term "chartered aircraft" operated to exclude coverage, Judge Bell's language is also interesting on that question:

> "We agree that the term was ambiguous. This being so, and if the ambiguous language can be construed in two ways, then the interpretation which is most favorable to the insured must be placed upon it."

business. They are their own draftsmen and lexicographers. If their lexicography and draftsmenship condemn them, they must suffer the consequences. If the law were otherwise, the layman would always lose as a victim of the "fine print."[3]

The decision of the majority becomes more shocking and upsetting, and its manifest error is magnified and brought into sharper and more vivid focus by the fact that both of the policies involved in two cases pending in this Court (*Paul Revere Life Insurance Company* v. *First National Bank in Dallas, Administrator of the Estate of Loy Thomas Brown, deceased; United Services Life Insurance Company* v. *Joan Flores Delaney*) were written *after* the *Warren*[4] decision wherein the Texas Court of Civil Appeals stated:

> "If the parties intended for the contract to eliminate coverage of the pilot, it could have so provided by using some reasonable term, such as 'exclusive of pilot,' or 'this policy does not cover the pilot, mechanics or any person riding in the plane employed by the assured to manipulate, to work on, to supervise, or to assist in operation of the plane.'"

The Supreme Court affirmed the Texas Court of Civil Appeals and stated:

> ". . . the insurer might have excluded him beyond question by the simple insertion of a phrase such as 'and not as to the pilot.'"

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[3]The universal application of this rule is demonstrated by the following quotation from the *Aschenbrenner* case, infra, so heavily relied upon by the majority:

> "Nothing in the policy gives any hint that words in this clause are used more narrowly than those in any other. The insurer has chosen the terms, and *it must be held to their full measure in this clause*, as in any other, whether its promise be for more or less." (Citing cases) (Emphasis added)

[4]See footnote 1.

Judge Spears (and I) also considered this a significant factor and stated:

> "Since the Warren Case, supra, was decided more than four years prior to the date the policy herein was issued, it is even more significant that the insurer, after being put on notice, did not exclude the pilot 'beyond question by the simple insertion of a phrase such as "and not as the pilot."'"

In order to bolster its holding, the majority abandons Texas law and seeks to justify its position by quoting from *Aschenbrenner* v. *United States Fidelity and Guaranty Co.*, 292 U.S. 80, 78 L.ed. 1137 (1934), in which the United States Supreme Court dealt with the word "passenger" in a railroad common carrier case.[5] The Texas Supreme Court dealt with that subject in *Warren* and stated:

> ". . . the significiance of 'passenger' as applied to common carriers has little relevance to a situation where no carriage for hire, public or private, is involved."

Assuming the existence of a conflict between the statement from *Aschenbrenner* and the statement from the Texas Supreme Court, which one should we follow in deal-

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[5]We quote the full text from *Aschenbrenner*, partially quoted by the majority, wherein Mr. Justice Stone dealt with the word "passenger":

> "We think the word 'passenger' can not be restricted to the technical meaning which may be assigned to it by the law of common carriers, for it also has a common or popular meaning which would at least include the insured who, with a ticket in his possession, was riding on the steps of the train. In its usual popular significance the term when applied to one riding a train, indicates a traveller, intending to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey. (citing cases) None of the standard dictionaries defines the term in a fashion suggesting that its meaning is to be limited in terms of the legal liability of the carrier. While for the purpose of judicial decision dictionary definitions often are not controlling, they are at least persuasive that meanings which they do not embrace are not common."

ing with Texas law? The answer is unequivocal and undisputed under every rule. We must follow Texas. Professor Moore in his work Federal Practice (2nd ed.) ¶ 0.309[2], Vol. 1A, p. 3238 states the rule:

> "Federal courts have similarly used their discretion where questions have arisen in the ascertainment of the state's common law. If there are no decisions exactly in point, relevant data in the shape of analogous decisions which afford a reasonably satisfactory basis for a conclusion as to the state law should be followed, *even though contrary to a decision of the federal Supreme Court* when exercising an independent judgment on the same point. The federal court must consider related decisions, analogies, and any reliable data tending convincingly to show what the state law is." (Emphasis added)

Lastly, as indicated in the beginning, we should not overrule two United States District Courts of Texas for light or transient reasons. As the Supreme Court said in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 204, 205, 100 L.ed. 199, 206 (1956):

> "Since the federal judge making these findings is from the [local] bar, we give *special weight* to his statement of what the [local] law is." (Emphasis added)

Again, the Supreme Court speaking in *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 282, 86 L.ed. 846, 848 (1942) stated:

> "No decision of the [state supreme court], or any other court of that State, construing the relevant [state] law has been brought to our attention. In the absence of such guidance, we shall leave *undisturbed* the interpretation placed upon purely local law by the [local] federal judge of long experience. . . ." (Emphasis added)

For the foregoing reasons I respectfully dissent. It is with regret that one must come to the realization that the beneficiaries of these insurance policies, purchased by deceased loved ones for the benefit of such beneficiaries, will be denied the protection purchased for them by those who paid their money for the policies. I would not take their money away from them because the law of Texas says they should have it. In its revolt against the law of Texas, the majority has unwittingly fallen into egregious error, and a grave injustice has resulted. Perhaps the only remedy in the federal judicial system left to the defeated beneficiaries is to seek the elusive and expensive Writ of Certiorari. Perhaps they will do so.

APPENDIX V

United States Statutes Involved

Title 28, U.S.C.A., Sec. 2101 (c):

> "Any other appeal or any Writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety (90) days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown may extend the time for applying for a Writ of Certiorari for a period not exceeding sixty (60) days."

Amendment V—United States Constitution "due process of law"

> "* * * nor be deprived of life, liberty or property without due process of law."

Title 28, U.S.C.A., Sec. 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil action in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."